IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

IN RE:	)	Chapter 7 Case
	)	Number 85-40555
DIAMOND MANUFACTURING	)	
COMPANY, INC.	)	
	)	
Debtor	)	
	)	
WILLIAM H MOORE, JR.	)	
	)	
Movant	)	
	)	
vs.	)	
W. JAN JANKOWSKI, TRUSTEE FOR	)	
DIAMOND MANUFACTURING	)	
COMPANY, INC.	)	
	)	
Respondent	)	

ORDER

William H. Moore, Jr. moves the court pursuant to Bankruptcy Rule 9024 to modify or amend the order dated June 5, 1992 awarding attorney's fees of One Hundred Twenty-Three Thousand One Hundred Eighty-Seven and 25/100 ($123,187.25) Dollars to Mr. Moore and One Hundred Twenty-Three Thousand One Hundred Eighty-Seven and 25/100 ($123,187.25) Dollars to Donald E. Austin. Having considered the arguments of Mr. Moore and relevant legal authority, the June 5, 1992 order will be vacated.

In 1981 Mr. Austin, president, CEO and sole shareholder of Diamond Manufacturing Company, Inc. ("Diamond" or "the debtor"),

hired Mr. Moore to represent Diamond in a dispute with the Army Corps of Engineers and W. F. Magann Corporation ("the Magann litigation").[1] During the course of

[1]For a detailed history of the Magann litigation see W.F. Magann Corp. v. Diamond Mfg. Co., 775 F.2d 1202 (4th Cir. 1985);

the litigation, Mr. Moore retained the South Carolina law firm of Lewis, Babcock, Pleilcones & Hawkins ("the Lewis firm") as lead trial counsel. Diamond filed a Chapter 11 petition in this court on August 29, 1985. On September 25, 1986 the Lewis firm was appointed nunc pro tunc as attorneys for special purpose to represent Diamond in the Magann litigation.[2] Diamond's Chapter 11 case was converted to Chapter 7 on August 26, 1988. By order dated October 19, 1989 a settlement of the Magann litigation for a total consideration paid Diamond's bankruptcy estate of One Million Seven Hundred Thousand and No/100 ($1,700,000.00) Dollars ("the settlement proceeds") was approved by this court.

Unfortunately, the attorney's fee agreement between Diamond and its attorneys Mr. Austin and Mr. Moore in the Magann litigation was not reduced to a written contract. Not surprisingly, the terms of the fee agreement have been questioned in this bankruptcy proceeding. It is undisputed, however, that under the

terms of the fee agreement Diamond's maximum exposure to attorneys' fees would not exceed one-third of the total recovery, which totals Five Hundred Sixty-Six Thousand Six Hundred Sixty-Six and 67/100 ($566,666.67) Dollars.[3] Under its fee agreement, the Lewis firm was entitled to compensation of Three Hundred Twenty Thousand Two Hundred Ninety-Two and 17/100 ($320,292.17) Dollars.[4] The balance of the maximum

---

W.F. Magann Corp. v. Diamond Mfg. Co., 678 F.Supp. 1197 (D. S.C. 1988); W.F. Magann Corp. v. Diamond Mfg. Co., 580 F.Supp. 1299 (D. S.C. 1984); In re: Diamond Mfg. Co. Inc., Ch. 7 case No. 85-40555 (Bankr. S.D. Ga. June 6, 1990).

[2]The Lewis firm was appointed by Honorable Herman W. Coolidge, then judge of this court.

[3]$1,700,000.00 X 1/3.

[4]As discussed below, this figure is calculated on an hourly fee basis plus a percentage of recovery pursuant to the terms of the fee agreement. By order dated October 17, 1989 I awarded fees of $320,292.17 to the Lewis firm.

attorneys' fees after payment of the Lewis firm's fee, Two Hundred Forty-Six Thousand Three Hundred Seventy-Four and 50/100 ($246,374.50) Dollars,[5] is the subject of Mr. Moore's motion. The June 5, 1992 order divided the balance of the fee award evenly between Mr. Moore and Mr. Austin, One Hundred Twenty-Three Thousand One Hundred Eighty-Seven and 25/100 ($123,187.25) Dollars each.

In support of his motion to modify or amend the June 5, 1992 order, Mr. Moore argues that the order 1) improperly awarded attorney's fees to Mr. Austin in light of a prior order of this court dated June 6, 1990, wherein I held Mr. Austin cannot recover any attorney's fees in this case; and 2) was entered without proper notice under Bankruptcy Rules 3007 and 7001 of Mr. Austin's claim of attorney's fees. As Mr. Moore is correct in his first argument, his

second argument is not addressed.

On June 6, 1990, relative to the matter now before the court, I determined 1) that Mr. Moore's attorney's lien for his services in the Magann litigation is unperfected under Georgia law and therefore is avoidable by the Chapter 7 trustee pursuant to 11 U.S.C. 545(2) and 2) that Mr. Austin cannot recover any attorney's fees for his work in the Magann litigation because it was performed in his capacity as Diamond's CEO, not as an attorney, and that conflicts of interest preclude appointment of Mr. Austin as counsel for special purpose pursuant to 11 U.S.C. §327(e). See In re: Diamond Mfg. Co. Inc., Ch. 7 case No. 85-40555 (Bankr. S.D. Ga. June 6, 1990). Mr. Moore appealed the June 6, 1990 order. Mr. Austin did not appeal. The June 6, 1990 decision was reversed by the district court, Honorable B. Avant Edenfield, on December 14, 1990 on the attorney's lien issue. In re: Diamond Mfg. Co., 123 B.R. 125 (S.D. Ga. 1990), aff'd, 959 F.2d 972 (11th Cir. 1992) (table). Judge Edenfield held that under Georgia law Mr. Moore held a perfected attorney's lien; therefore, Mr. Moore's lien cannot be avoided by the Chapter 7

[5] $566,6-66.67 - $320,292.17.

trustee pursuant to 11 U.S.C. §545(2).[6]

Subsequently, at hearing held June 4, 1992 on Mr. Moore's motion to require payment of attorney's fees from the court registry, Mr. Austin asserted his claim for attorney's fees against the settlement proceeds and testified under oath about his participation in the Magann litigation. Based on Mr. Austin's testimony at the June 4, 1992 hearing I made a determination that although he was a controlling officer and shareholder of Diamond, his work in the litigation was performed as an attorney. Accordingly, the order dated June 5, 1992 was entered splitting the balance of the maximum fee award evenly between Mr. Moore and Mr. Austin, One Hundred Twenty-Three Thousand One Hundred Eighty-Seven and 25/100 ($123,187.25) Dollars each.

Moore is correct in his contention that this award was improper because Mr. Austin failed to appeal the June 6, 1990 order. As to Mr. Austin, the June 6, 1990 order is binding, notwithstanding Mr. Moore's successful appeal on the attorney's lien issue. See Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 101 S.Ct. 2424, 69 L.E.2d 103 (1981). "[T]he res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal May 16, 1991). In its order, the district court made it clear that Mr. Moore could not pursue his attorney's fees claim both as a creditor and as an attorney appointed for special purpose. Mr. Moore voluntarily dismissed his petition for appointment as counsel for special purpose on May 14, 1992.

---

[6]Following the June 6, 1990 order, but prior to the district court's reversal of December 14, 1990, Mr. Moore sought and obtained appointment nunc pro tunc as counsel for special purpose pursuant to 11 U.S.C. §327(e) by order dated November 2, 1990. In the November 2, 1990 order Mr. Moore was awarded attorney's fees of $57,485.61 as counsel for special purpose for representing the debtor in the Magann litigation. The district court vacated my November 2, 1990 order on appeal by Signet Commercial Credit Corporation, a creditor of Diamond. In re: Diamond Mfg. Co. Inc., CV 490-327 (S.D. Ga.

principle subsequently overruled in another case." Id., 101 S.Ct. at 2428. Further, there is "no general equitable doctrine . . . which countenances an exception to the finality of a party's failure to appeal merely because his rights are 'closely interwoven' with those of another party." Id. at 2429. Under the Moitie rationale, having made the decision not to appeal the June 6, 1990 order, Mr. Austin cannot benefit from Mr. Moore's successful appeal of that order, and evidence presented subsequent to the June 6, 1990 order which contradicts findings made therein concerning the nature of Mr. Austin's services in the Magann litigation do not affect the finality of the original order as to Mr. Austin. Therefore, based on the determinations made in the June 6, 1990 order, Mr. Austin is not entitled to a fee award.

Pursuant to Federal Rule of Civil Procedure ("FRCP") 60(b)(4)[7], made applicable to this Chapter 7 proceeding by Bankruptcy Rule 9024, the June 5, 1992 order may be vacated as void because the June 6, 1990 order is final and binding on Mr. Austin as

to all determinations made therein pertaining to his claim for attorney's fees.

Mr. Moore now maintains that he is he is entitled to Two Hundred Forty-Six Thousand Three Hundred Seventy-Four and 50/100 ($246,374.50) Dollars. Mr. Moore argues that under the fee agreement he and Mr. Austin would split the balance of the attorneys' fees remaining after payment of the Lewis firm's hourly

---

[7]FRCP 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void. . . . The motion shall be made within a reasonable time. . . .

Moore's motion was filed within a "reasonable time."

fee. Since Mr. Austin cannot recover his share of the remaining attorneys' fees, Mr. Moore contends he should be paid the balance as his fee award. This assertion is inconsistent with Mr. Moore's prior testimony concerning his rightful compensation under the terms of the unwritten fee agreement, as well as representations made in pleadings filed by Mr. Moore in this case.

According to Mr. Moore's sworn testimony, he initially agreed to represent Diamond on an hourly fee basis, but later, when the hourly fee was not paid to his satisfaction, he agreed to continue to represent Diamond in the Magann litigation on a contingent fee basis.[8] Mr. Moore testified as follows regarding the fee agreement:

> So, the arrangement was that I would, from that point on, continue the case on a contingent fee basis if they paid my out-of-pocket expenses that I had incurred and if they kept them current. They would pay the South Carolina lawyer on a hourly fee basis and if we won the
>
> counterclaim, then a third of the recovery was to be considered attorney's fees out of which the money paid to the South Carolina lawyer was going to be taken, any fees paid to other Georgia lawyers was to be taken and I was going to get about a third of that recovery -- a third of the attorney's fees because considered that there was -- there were two other lawyers involved, Mr. Lewis and Mr. Austin and myself. Then, Mr. Lewis's fee was simply to be deducted from what would have been his theoretical third. If there was any difference -- in other words, if Mr. Lewis's hourly fees didn't amount to a third of the recovery, he would be given the rest of it, the third, although he was not appearing on a contingent fee basis.[9]
>
> ***
>
> Q All right, sir. Can you give me idea, sir, about when it was in point of time when you shifted from hourly to a percentage?
>
> A Yes, sir, that was in August of 1982. I would say August the -- between August the 5th and August the 10th, sometime like that, when I met with the executive comm --

---

[8]Transcript of hearing, July 18, 1990, on Mr. Moore's petition for appointment as counsel for special purpose, pp. 78, 85-89.

[9]Transcript of hearing, July 18, 1990, pp. 88-89 (Mr. Moore testifying in response to a question asked by Julian H. Toporek, Mr. Moore's counsel then and in the matter now before me).

or the, excuse me, the management committee.

Q Okay. And, as far as your percentage, you indicated that it was your understanding that a third was going to be allocated of whatever was recovered to all attorneys --

A Yes, sir.

Q -- and from that you would get some percentage?

A I expected to get a third of that or 9% of the total recovery. That is, I was -- the total attorney's fees would be a third -

Q Uh-Uh (affirmative response).

A -- I was to get a third of the total attorney's fees or -

Q one-ninth?

A -- one-ninth of the recovery because, in my view, there were two other lawyers or law firms that had to be taken care of out of that.

Q All right. And, if Mr. Babcock's [of the Lewis firm] final hourly fee exceeded one-third of the total fee, that would cut into what would be allowed to you, right?

That would -- that would diminish mine if his total hourly fees exceeded a third of the recovery, that by the amount that it exceeded that, the other lawyers were going to have to take a cut. Since none of us thought we could persuade a South Carolina lawyer to take it on a contingent fee basis, then we would have to pay them by the hour.

Q So, you understood that your maximum fee would be one-ninth of the recovery?

A Of the recovery, whether that was under the Board of Contract Appeals case or the lawsuit, whichever occurred first.

Q All right. And, who else would have been sharing in that; Mr. Austin and anyone else?

A It would have been Mr. Lewis, Mr. Austin, and myself. I say Mr. Lewis and his law firm.

Q Uh-huh. All right, sir. Was your understanding then the way it would go is if you could take one-third of the recovery, deduct one-third or a greater amount if the Lewis, Babcock firm actually wound up incurring a fee greater than a third -

A Right.

Q -- and, then, you would be dividing the

difference by two --
A by two.
Q -- between Mr. Austin and yourself?
A That is correct.[10]

Based on Mr. Moore's testimony, the fee agreement provided that Diamond's counsel in the Magann litigation - the Lewis firm, Mr. Moore, and Mr. Austin - would share equally one-third of the total recovery obtained in the litigation, one-ninth each; however, under the fee agreement, in the event the Lewis firm's hourly fee exceeded its one-ninth, it was not limited to one-ninth of the recovery, but would be compensated based on its hourly fee. To the extent that the Lewis firm's fee exceeded one-ninth of the total recovery, the excess would be absorbed equally from Mr. Moore's and Mr. Austin's fees; that is, their respective one-ninths would be reduced equally as necessary to pay the Lewis firm's hourly fee. One ninth of the settlement of $1.7 million equals One Hundred Eighty-Eight Thousand Eight Hundred Eighty-Eight and 89/100 ($188,888.89) Dollars. The Lewis firm's fee award of Three Hundred Twenty Thousand Two Hundred Ninety-Two and 17/100 ($320,292.17) Dollars exceeds its one-ninth allocation by One Hundred Thirty-One Thousand Four Hundred Three and 28/100 ($131,403.28) Dollars. Mr. Moore's and Mr. Austin's one-ninth contingent fee must be reduced by Sixty-Five Thousand Seven Hundred One and 64/100 ($65,701.64) Dollars each, resulting in an award of One Hundred Twenty-Three Thousand One Hundred Eighty-Seven and 25/100 ($123,187.25) Dollars.

Mr. Moore's contention that he should receive Mr. Austin's attorney's fees since Mr. Austin himself is barred by the res judicata effect of the June 6, 1990

---

[10]Transcript of hearing, July 18, 1990, pp. 108-10 (questioning of Mr. Moore by W. Jan Jankowski, the Chapter 7 trustee).

order denying him the right to recover any fees is without merit. Under the terms of the fee agreement, as described under oath by Mr. Moore, Mr. Moore is only entitled to a maximum of one-ninth of the total recovery in the Magann litigation less any reduction required to pay the Lewis firm's hourly fee, which is One Hundred Twenty-Three Thousand One Hundred Eighty-Seven and 25/100 ($123,187.25) Dollars."[11] The portion of the maximum fee award that under the fee agreement would be

payable to Mr. Austin, One Hundred Twenty-Three Thousand One Hundred Eighty-Seven and 25/100 ($123,187.25) Dollars, remains property of Diamond's bankruptcy estate. 11 U.S.C. §541(a).

It is therefore ORDERED that the June 5, 1992 order is vacated[12];

---

[11]This construction of the fee agreement has previously been advanced by Mr. Moore himself:

> Another construction of the agreement would allow the Court to compute the maximum attorney's fee exposure of $566,666.67, deduct the Lewis firm award of $320,292-17 leaving a balance of $246,374.50 as the maximum recoverable by Austin and Moore, and to divide that sum in half and allow Mr. Moore a fee of $123,137.25 [sic]. This is perhaps the most reasonable construction of the fee agreement and would more accurately reflect Mr. Moore's contribution to the success of the litigation, while still benefitting the [bankruptcy] Estate by substantially reducing the fees which might have been awarded to Mr. Austin had he been entitled to receive same.

Mr. Moore's motion to alter or amend the order dated November 2, 1990 (pages unnumbered).

[12]The United States of America and Mr. Moore filed motions to stay distribution of the awards in the June 5, 1992 order, vacated herein. As to these motions, the district court, Honorable John F. Nangle, withdrew the reference for the limited purpose of considering the motions for stay and granted the motions. The motions filed by the USA and Mr. Moore to stay the June 5, 1992 order are now moot and accordingly, by separate order, are dismissed. Mr. Austin filed a response to

further ORDERED that the Chapter 7 trustee, W. Jan Jankowski, disburse to William H. Moore, Jr. by payment to his attorney of record, Julian H. Toporek, One Hundred Twenty-Three Thousand One Hundred Eighty-Seven and 25/100 ($123,187.25) Dollars together with all accrued interest on said sum while in the possession of the trustee.[13]

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 13th day of November, 1992.

Mr. Moore's motion to stay the June 5, 1992 order and in response Mr. Moore filed a motion to strike Mr. Austin's response. Mr. Moore's motion to strike is also now moot and accordingly, by separate order, is dismissed.

[13]This order does not relieve the trustee of certain liens asserted by the Internal Revenue Service ("IRS") against the funds in question. The IRS has served two notices of tax lien on the trustee with respect to alleged tax liabilities of Mr. Moore and Mr. Toporek. The IRS is authorized pursuant to 26 U.S.C. §6331 and §6332 to levy upon the property of a taxpayer upon which a lien attaches under §6321. Under the Internal Revenue Code, 26 U.S.C., a third party holding property of a taxpayer subject to a tax lien may be held personally liable for the taxes upon which the lien is based if the third party fails to surrender the property to the IRS upon demand. 26 U.S.C. §6632(d). At a hearing held in this case on October 8, 1992, it was requested that the trustee withhold sufficient funds from any disbursement of attorney's fees to Mr. Moore to satisfy the tax liens if necessary. However, because interest and penalties may accrue on the tax deficiencies, see 26 U.S.C. §§6601(a), 6632(d), 6665, it is impossible to determine what amount of money would be required to satisfy the tax liens once any dispute over the tax liens is resolved. Therefore, I will not instruct the trustee to segregate any funds for satisfaction of the tax liens. The trustee's disbursement of this award of attorney's fees to Mr. Moore is not exempt from the IRS's liens.